Filed 9/16/21 Berry v. Pope Valley Union Elementary School Dist. CA1/3

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION THREE

CHARLES J. BERRY, Plaintiff and Appellant, v. POPE VALLEY UNION ELEMENTARY SCHOOL DISTRICT et al., Defendants and Respondents.	A160256 (Napa County Super. Ct. No. 19CV00073)

In May 2018, pro per appellant Charles J. Berry was working as a substitute teacher for respondent Pope Valley Union Elementary School District (Pope Valley School District), when three students complained about his reference to a pornographic web site. After a brief investigation, the superintendent of Pope Valley School District sent letters to respondent Napa County Office of Education (NCOE) and the California Commission on Teacher Credentialing (Commission) accusing Berry of multiple acts of misconduct and suggesting "further action" on their part. In response, NCOE inactivated Berry as a substitute teacher for Napa County. As a result, Berry was no longer able to work as a substitute teacher in Napa County.

In response, Berry filed this action, alleging a gender discrimination claim and multiple tort claims against respondents.[1] After Berry amended his complaint twice, the trial court sustained respondents' demurrers. In doing so, the trial court granted leave to amend the gender discrimination and negligence claims but denied leave to amend the other tort claims. Berry did not, however, amend his gender discrimination and negligence claims. Instead, he orally asked the trial court for leave to add new causes of action at the hearing on respondents' ex parte applications to dismiss the case. The trial court refused and dismissed the case. Berry now appeals, challenging the sustaining of the demurrers and the denial of his request to amend.

We hold that the trial court erred in sustaining the demurrer to Berry's gender discrimination claim. We also hold that the trial court abused its discretion by refusing to give Berry the opportunity to file a motion to amend his complaint to add new causes of action. We affirm in all other respects.

BACKGROUND[2]

Berry is a certified substitute teacher. On May 8, 2018, he was working as a substitute teacher for a class of seventh and eighth graders at Pope Valley School District located in Napa County, when three students accused him of referencing a pornographic web site during class. Berry denied making any such reference, claiming that the students made up the accusation to avoid certain school obligations.

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[1] Pope Valley School District and NCOE are collectively referred to as respondents.

[2] Because Berry appeals from the sustaining of respondents' demurrers, we draw our facts from those pleaded in the complaint and those of which we may take judicial notice. (*Elder v. Pacific Bell Telephone Co.* (2012) 205 Cal.App.4th 841, 846, fn. 3.)

In response to the accusations, Ken J. Burkhart, the teacher of the class and the principal and superintendent at Pope Valley School District, interviewed students in the class. An administrative designee of Burkhart also briefly interviewed Berry. Following the interviews, Burkhart sent letters on May 9, 2018 to NCOE and the Commission. In the letters, Burkhart alleged that Berry engaged in the following misconduct while teaching his class on April 25, 2018: (1) "[l]ed the class on a lengthy discussion about the good attributes of Adolph Hitler;" (2) "[l]ed the class on a lengthy discussion about a conspiracy to fake the moon landing"; (3) "[a]pproached an 8th grade boy who quickly closed his laptop and accused that student of watching 'pornhub' (a specific online adult website)"; and (4) offered "to give a lesson or help" after observing several students "reviewing the reproductive system" as part of their schoolwork. Burkhart also alleged that Berry arrived 30 minutes late on May 8 and was wearing inappropriate clothing—i.e., "black gym shorts and a black t-shirt." Finally, Burkhart alleged that Berry commented on another employee's appearance, which made her "very upset and" feel "harassed."

Berry admitted he discussed Hitler and the moon landing with the class. He, however, denied "glorif[ying] Hitler, or even present[ing] him in an overall positive light." As to the moon landing, he claimed he only "described the reasons why some question whether we actually went to the moon" and informed students that "these reasons ha[d] been answered by NASA supporters" and can be found "online." He also admitted he arrived at 8:45 a.m. on May 8—30 minutes after he was supposed to arrive—but claimed there was no need for him to arrive earlier because class did not start until 9:00 am. He also admitted he wore shorts and a t-shirt but claimed the shorts were similar to what "postal workers and occasionally policemen"

wear, the shirt "was more expensive than cheap cotton Ts," and no one questioned his attire at the time. Finally, Berry did not recall any conversations about the reproductive system or comments on an employee's appearance.

Based on the misconduct alleged in his letters, Burkhart stated that Berry was no longer welcome to teach at Pope Valley School District. Burkhart also suggested "there may be a pattern of behavior that warrants further action on the part of" NCOE and the Commission. In addition to the letters, Burkhart sent pages from Berry's personnel file with his private information to the Commission. Finally, Burkhart made "false and misleading statements . . . to induce law enforcement officials to investigate" Berry.

On May 8, 2018, NCOE sent an email to all Napa County school districts stating: "Effective immediately, place Substitute Teacher, Charles Berry, INACTIVE—until further notice." Two days later, John Zikmund, NCOE's Administrator of Human Resources, sent an email to Berry stating that "we are inactivating you as a Substitute Teacher effectively immediately as you have been considered not a good fit for our schools and students." As a result of these actions, Berry was unable to work as a substitute teacher for over a year and suffered physical and psychological symptoms.

In taking these actions, respondents refused to inform Berry of the specific allegations against him and did not give Berry an opportunity to respond. They also refused to give Berry information about the witnesses and evidence against him.

In November 2018, Berry presented government claims to both respondents. On March 25, 2019, Berry submitted an intake form to the California Department of Fair Employment and Housing (DFEH), alleging

gender discrimination. When he did not hear back from DFEH, Berry filed his original verified complaint on May 15, 2019. Approximately two weeks later, DFEH replied to Berry and explained that he needed to file a formal complaint in order to obtain a right to sue letter. Berry did so on August 8, 2019, and DFEH issued a right to sue letter on August 9.

In June 2019, the Commission completed its investigation and recommended "no adverse action." On July 31, 2019, Berry filed his first amended complaint. The trial court sustained respondents' demurrers to that complaint with leave to amend. At the hearing on the demurrers, Berry informed the trial court that he wished to add four new causes of action. In response, the court suggested that Berry "file an amended [c]omplaint on what has already been addressed here." It then told Berry that if he wished to add new causes of action, he could "do a motion to amend after the fact, that can be fully briefed and addressed." The trial court's written order similarly stated that "[i]f Berry wants to add new causes of action as he represented at the hearing, he shall file a noticed motion for leave to amend after the current pleadings are settled."

Berry filed a second amended complaint (SAC), alleging nine causes of action: (1) libel and slander; (2) fraudulent concealment and suppression; (3) gender discrimination; (4) intentional infliction of emotional distress; (5) negligence; (6) breach of fiduciary duty; (7) invasion of privacy; (8) intentional interference with prospective economic advantage; and (9) infringement of free speech. Berry only alleged the invasion of privacy cause of action against Pope Valley School District but alleged his other causes of action against both respondents.

Both respondents demurred. As to the causes of action for gender discrimination and negligence, the trial court sustained the demurrers with

leave to amend. As to the remaining causes of action, it sustained the demurrers without leave to amend. The trial court gave Berry 10 days from "service of notice of entry of order" to file a third amended complaint.

Berry did not file a third amended complaint, and both respondents filed ex parte applications to dismiss the case. At the hearing on the applications, Berry stated that he wished to file an amended complaint with "three new causes of action regarding whistle blower, civil rights and procedural due process." He argued that he should be allowed to do so even though "he had not filed a motion for leave to amend to raise new causes of action" because "he understood from the previous hearing that he had to wait until the then current pleadings 'were settled' before he could seek leave to add causes of action." The trial court disagreed and dismissed the case. Berry timely appealed.

DISCUSSION

A. Respondents' Demurrers

"We review de novo the trial court's order sustaining a demurrer." (*Cansino v. Bank of America* (2014) 224 Cal.App.4th 1462, 1468.) "In doing so, [our] only task is to determine whether the complaint states a cause of action." (*Brown v. Deutsche Bank Natl. Trust Co.* (2016) 247 Cal.App.4th 275, 279.) Thus, "[w]e must affirm if the sustaining of a general demurrer was proper on any of the grounds stated in the demurrer, regardless of the trial court's stated reasons." (*Chapman v. Skype Inc.* (2013) 220 Cal.App.4th 217, 225.)

In our review, "[w]e give the pleading a reasonable interpretation and treat the demurrer as admitting all material facts properly pleaded. [Citation.] We do not, however, assume the truth of contentions, deductions or conclusions of law." (*Guerrero v. Pacific Gas & Electric Co.* (2014) 230

Cal.App.4th 567, 571.) " 'We also consider any matters which may be judicially noticed.' "[3] (*Blank v. Kirwan* (1985) 39 Cal.3d 311, 318.)

"When a demurrer is sustained with leave to amend, and the plaintiff chooses not to amend but to stand on the complaint, an appeal from the ensuing dismissal order may challenge the validity of the intermediate ruling sustaining the demurrer." (*County of Santa Clara v. Atlantic Richfield Co.* (2006) 137 Cal.App.4th 292, 312.) In that situation, "the plaintiff is deemed to have elected to stand on the validity of the cause of action as originally pleaded." (*Natl. Union Fire Ins. Co. of Pittsburgh, PA v. Cambridge Integrated Services Group, Inc.* (2009) 171 Cal.App.4th 35, 44.) "When ' "the trial court sustains a demurrer without leave to amend, we review the determination that no amendment could cure the defect in the complaint for an abuse of discretion. [Citation.] The trial court abuses its discretion if there is a reasonable possibility that the plaintiff could cure the defect by amendment." ' " (*Berger v. Varum* (2019) 35 Cal.App.5th 1013, 1018.)

Berry concedes his cause of action for breach of fiduciary duty is infirm but contests the demurrers to his other causes of action. We find that the trial court erred in sustaining the demurrers to Berry's cause of action for gender discrimination but properly sustained the demurrers to his other causes of action.

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[3] We deny Berry's request for judicial notice of two emails from the Commission and a page from NCOE's web site because they "are irrelevant to this appeal." (*Diego v. Pilgrim United Church of Christ* (2014) 231 Cal.App.4th 913, 924, fn. 13.)

1. Gender Discrimination

The trial court acknowledged that Berry submitted an intake form to DFEH on March 25, 2019—well within the one-year deadline for filing a DFEH complaint. It also acknowledged that Berry's DFEH complaint " 'relates back to the filing of the intake form.' " Nonetheless, the trial court sustained respondents' demurrers with leave to amend "to allow Berry an opportunity to attach the purported intake form to his pleading." On appeal, neither respondent argues that Berry had to attach his intake form in order to establish the timeliness of his DFEH complaint. Instead, they argue that, under the applicable version of Government Code section 12960, Berry had to file the actual DFEH complaint within one year "from the date upon which the unlawful practice . . . occurred."[4] (Former Gov. Code, § 12960, subd. (d), amended by Stats. 2019, ch. 709, § 1.) Because Berry did not file his DFEH complaint until August 8, 2019—roughly 15 months after he was placed on inactive status on May 8, 2018—they contend his cause of action for gender discrimination is barred. Even if, as respondents contend, an intake form cannot qualify as a timely administrative complaint, Berry has alleged sufficient facts to excuse his untimely DFEH complaint on equitable grounds. The trial court therefore erred in sustaining the demurrer to his gender discrimination claim.

"The timely filing of an administrative complaint is a prerequisite to the bringing of a civil action for damages under the" Fair Employment and

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[4] Before January 1, 2020, Government Code section 12960, subdivision (d) stated in relevant part that "[n]o complaint may be filed after the expiration of one year from the date upon which the alleged unlawful practice or refusal to cooperate occurred." That section did not, however, explain what the filing of a complaint meant. (But see Cal. Code Regs., tit. 2, § 10009,

Housing Act. (*Romano v. Rockwell Internatl., Inc.* (1996) 14 Cal.4th 479, 492.) But there are "equitable exceptions to this" prerequisite. (*Holland v. Union Pacific Railroad Co.* (2007) 154 Cal.App.4th 940, 946 (*Holland*).) For example, "[t]he one-year time limit for filing a complaint of discrimination with" DFEH "may be tolled in cases where the department misleads the complainant about filing obligations, commits errors in processing the complaint, or improperly discourages or prevents the complainant from filing at all." (Cal. Code Regs., tit. 2, § 10018; see also *Holland*, at p. 947 [excusing untimely complaint because the plaintiff was misled by DFEH]; *Denney v. Universal City Studios, Inc.* (1992) 10 Cal.App.4th 1226, 1234 [excusing untimely DFEH complaint because the plaintiff was misled by the U.S. Equal Employment Opportunity Commission], abrogated on other grounds by *City of Moorpark v. Superior Court* (1998) 18 Cal.4th 1143.)

After a complainant submits an intake form, DFEH typically schedules an intake interview. (Cal. Code Regs., tit. 2, § 10007, subd. (b).) Although there is no express timeline for that interview, DFEH may give "priority for the purpose of scheduling an intake interview" if the "statute of limitations would run in thirty (30) days or less." (Cal. Code Regs., tit. 2, § 10008, subd. (a).) "[T]o avoid missing the statute of limitations for filing" the administrative complaint, DFEH may also "file a complaint for investigation without first obtaining the complainant's verification of the complaint."

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subd. (d) ["The filing date of a complaint shall be the date a DFEH office receives a verified complaint"].) In 2019, the Legislature fixed this omission by adding subdivision (b) to Government Code section 12960—which states: "For purposes of this section, filing a complaint means filing an intake form with the department and the operative date of the verified complaint relates back to the filing of the intake form." This amendment, however, only became effective January 1, 2020 and did not "revive lapsed claims." (Stats. 2019, ch. 709, §§ 1, 3.)

(*Id.*, § 10008, subd. (b).) Finally, DFEH "may promptly initiate and conduct an intake interview by phone, without an appointment, or waive the intake process and accept a complaint for investigation using a written statement or correspondence from the complainant verified under penalty of perjury" so a complainant does not miss the filing deadline. (*Id.*, § 10010.) Read together, these regulations strongly suggest that DFEH must act reasonably to ensure that a complainant does not miss the statute of limitations for filing an administrative complaint.

In this case, Berry submitted his intake form on March 25, 2018—which gave DFEH over 40 days to respond and draft a complaint before the one-year statute of limitations expired. (Cal. Code Regs., tit. 2, § 10009, subd. (a).) Despite this, DFEH did not contact Berry for an intake interview until May 28, 2018—more than two weeks after the deadline for filing his DFEH complaint. By failing to contact Berry earlier, DFEH either committed error in processing Berry's complaint or improperly discouraged or prevented him from filing a timely complaint. The deadline for Berry's DFEH complaint should therefore have been tolled. (See *id.*, § 10018.) Accordingly, the trial court erred in sustaining the demurrers to Berry's gender discrimination claim.

2. Libel Against Pope Valley School District

Based on Burkhart's letters to NCOE and the Commission and his communications to law enforcement, Berry asserts a cause of action for libel against Pope Valley School District. These letters and communications, however, are absolutely privileged under Civil Code section 47, subdivision (b). The libel claim is therefore barred.

"Civil Code section 47, subdivision (b) provides that any publication made in any 'judicial proceeding' or 'in any other official proceeding

authorized by law' is privileged." (*Lee v. Fick* (2005) 135 Cal.App.4th 89, 96 (*Lee*).) This includes "communications to an official agency intended to induce the agency to initiate action." (*Ibid.*) Thus, complaints about a teacher made to a school board are "absolutely privileged" under Civil Code section 47, subdivision (b). (*Martin v. Kearney* (1975) 51 Cal.App.3d 309, 311 (*Martin*); see also *Brody v. Montalbano* (1978) 87 Cal.App.3d 725, 732 (*Brody*) [complaints about teacher to school board are absolutely privileged].) So too are complaints about a teacher made to the Commission. (See *Picton v. Anderson Union High School Dist.* (1996) 50 Cal.App.4th 726, 737 (*Picton*) [complaints by school district to the Commission about teacher are absolutely privileged].) Finally, under the version of Civil Code section 47, subdivision (b) in effect at the time of Burkhart's communications, complaints to law enforcement were also absolutely privileged.[5] (*Hagberg v. California Fed. Bank FSB* (2004) 32 Cal.4th 350, 355 (*Hagberg*).)

There can be no question that Burkhart's letters to NCOE and the Commission were intended "to prompt official action." (*Lee*, *supra*, 135 Cal.App.4th at p. 96.) They are therefore absolutely privileged. (See *ibid.*; *Picton*, *supra*, 50 Cal.App.4th at p. 737; *Brody*, *supra*, 87 Cal.App.3d at

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[5] In 2020, the Legislature amended Civil Code section 47. (Stats. 2020, ch. 327, § 2.) Under these amendments, a "communication between a person and a law enforcement agency in which the person makes a false report that another person has committed, or is in the act of committing a criminal act or is engaged in any activity requiring law enforcement intervention, knowing that the report is false, or with reckless disregard for the truth or falsity of the report" is no longer absolutely privileged. (Civ. Code, § 47, subd. (b)(5).) Because there is no indication of any legislative intent to apply this amendment retroactively, we do not apply that amendment here. (See *USS-Posco Industries v. Case* (2016) 244 Cal.App.4th 197, 216 ["when construing statutes, we presume they do not apply retroactively unless the Legislature has said otherwise expressly or unmistakably"].)

p. 732; *Martin*, *supra*, 51 Cal.App.3d at p. 311.) Similarly, Burkhart's communications to law enforcement seeking to "institute[] a criminal investigation against" Berry are absolutely privileged. (*Hagberg*, *supra*, 32 Cal.4th at p. 355.)

Berry's arguments for the creation of an exception to the privilege found in Civil Code section 47, subdivision (b) are not persuasive. It is well settled that the privilege applies to "all torts except malicious prosecution." (*Silberg v. Anderson* (1990) 50 Cal.3d 205, 212 (*Silberg*).) This includes libel. (*Id.* at p. 215.) Our high court also rejected an " 'interest of justice' " exception long ago. (See *id.* at p. 218.) Accordingly, the trial court did not abuse its discretion by sustaining without leave to amend Pope Valley School District's demurrer to Berry's libel claim.

3. Libel Against NCOE

In his libel cause of action against NCOE, Berry alleges that NCOE's email to Napa County school districts placing him on "inactive" status and its email informing Berry of that status are defamatory. But neither email "is reasonably susceptible to a defamatory interpretation." (*Smith v. Maldonado* (1999) 72 Cal.App.4th 637, 647 (*Smith*).)

As to NCOE's email to school districts, Berry does not dispute that NCOE inactivated him. Although he argues that the email implied wrongdoing on his part, mere "innuendo" cannot make "an accurate and unambiguous statement of true facts" "defamatory as a matter of law." (*Smith*, *supra*, 72 Cal.App.4th at p. 650, italics omitted.)

As to NCOE's email to Berry stating that he is "not a good fit for our schools and students", that email merely stated an opinion that does not imply a "false assertion of fact." (*Summit Bank v. Rogers* (2012) 206 Cal.App.4th 669, 696.) This conclusion is bolstered by the fact that NCOE

only sent the email to Berry. (See *id.* at p. 696 ["To determine whether a statement is actionable fact or nonactionable opinion, we apply a totality of the circumstances test pursuant to which we consider both the language of the statement itself and the context in which it is made"].)

Because Berry identifies no other allegedly defamatory statements made by NCOE, the trial court did not abuse its discretion by denying leave to amend.

4. Fraudulent Concealment and Invasion of Privacy

Respondents contend Berry's causes of action for fraudulent concealment and invasion of privacy are barred because they were not fairly reflected in his government claims. We agree.

"[F]ailure to timely present a claim for money or damages to a public entity bars a plaintiff from filing a lawsuit against that entity." (*State of California v. Superior Court (Bodde)* (2004) 32 Cal.4th 1234, 1239 (*Bodde*).) To comply with this requirement, a government claim must " 'fairly reflect' " the cause of action. (*Gong v. City of Rosemead* (2014) 226 Cal.App.4th 363, 376 (*Gong*).) Thus, the "total omission of an essential element" of a cause of action "from the claim" bars that cause of action. (*Loehr v. Ventura County Community College Dist.* (1983) 147 Cal.App.3d 1071, 1083 (*Loehr*).)

Here, Berry's cause of action for fraudulent concealment alleges that respondents concealed certain policies relating to their handling of allegations against substitute teachers and Burkhart's nature as "an unreasonable, excitable person, given to making accusations." Berry's government claims, however, do not mention any policies, much less the concealment of those policies. His claims also make no mention of any duty on the part of respondents to inform Berry of Burkhart's nature. Because Berry's government claims do not fairly reflect his cause of action for

fraudulent concealment, that cause of action is barred. (See *Gong*, *supra*, 226 Cal.App.4th at p. 376; *Loehr*, *supra*, 147 Cal.App.3d at p. 1083.)

Berry's government claims also do not mention the transmission of his personnel file to the Commission—the sole basis for his privacy cause of action against Pope Valley School District. Indeed, Berry concedes that his claims failed to do so because he did not learn about the transmission until after he presented them. His privacy cause of action against Pope Valley School District is therefore barred as well. (*Bodde*, *supra*, 32 Cal.4th at p. 1239.)

Because the time for presenting a claim asserting his fraudulent concealment and privacy causes of action had passed (see Gov. Code, §§ 911.2, subd. (a) [claim must be presented "not later than six months after the accrual of the cause of action"] & 911.4, subd. (b) [application to submit late claim must be presented within "one year after the accrual of the cause of action"]), the trial court did not abuse its discretion by denying leave to amend.

5. Intentional Infliction of Emotional Distress

In support of his cause of action for intentional infliction of emotional distress, Berry cites respondents' various acts and omissions in handling the allegations against him, including their defamatory communications, and their refusal to reinstate him as a substitute teacher. But Berry was an at-will employee (Educ. Code, § 44953), and only cites respondents' "personnel management activit[ies]" as the alleged outrageous conduct. (*Janken v. GM Hughes Electronics* (1996) 46 Cal.App.4th 55, 80.) Such activities are "insufficient to support a claim of intentional infliction of emotional distress, even if improper motivation is alleged." (*Ibid.*) Accordingly, the trial court

did not abuse its discretion in sustaining the demurrer to this claim without leave to amend.

6. Negligence

Berry did not amend his negligence cause of action despite being given leave to do so. He now contends his SAC sufficiently alleged a negligence claim based on Burkhart's failure to comply with California Code of Regulations, title 5, section 80303 (section 80303) and NCOE's failure to apply Education Code section 44427. These contentions lack merit.

Even if Burkhart's letter to the Commission did not comply with section 80303, it is absolutely privileged under Civil Code section 47, subdivision (b). (*Ante*, at pp. 12–14.) Likewise, Education Code section 44427 does not support Berry's negligence claim against NCOE. That section gives "[c]ounty boards of education" the power to "revoke or suspend, for immoral or unprofessional conduct, evident unfitness for teaching, or persistent defiance of, and refusal to obey the laws regulating the duties of, teachers, the certificates granted by them." (Educ. Code, § 44427.) Berry does not, however, allege that his *certificate* was ever revoked or suspended. Indeed, he acknowledged that the Commission took "no adverse action" against him.

Berry never raised below the other grounds cited in his opening brief to support his negligence cause of action. Accordingly, the trial court did not err in sustaining the demurrers to that cause of action.

7. *Intentional Interference with Prospective Economic Advantage*

Berry's intentional interference with prospective economic advantage claim against Pope Valley School District—which is based solely on Burkhart's letters to NCOE and the Commission—is barred by Civil Code section 47, subdivision (b). (*Ante,* at pp. 10–12; *Brody*, *supra*, 87 Cal.App.3d

at p. 738 [barring interference with prospective economic advantage claim].) As to Berry's interference claim against NCOE, Berry concedes that he did not address that claim in his opening brief. He therefore forfeited the issue on appeal. (See *Christoff v. Union Pacific Railroad Co.* (2005) 134 Cal.App.4th 118, 125 ["appellant's failure to discuss an issue in its opening brief forfeits the issue on appeal"].)

8. Infringement of Right to Free Speech

In this cause of action, Berry alleged that respondents violated his rights to free speech under the U.S. and California Constitutions by punishing him for his classroom discussions about Hitler and the moon landing. But Berry was speaking to his class as a government employee—and not as a private citizen. (See *Johnson v. Poway Unified School Dist.* (9th Cir. 2011) 658 F.3d 954, 967–968 (*Johnson*) ["Johnson did not act as a citizen when went to school and taught class . . .; he acted as a teacher—a government employee"].) As a result, respondents "acted well within [federal and state] constitutional limits" in punishing him for those classroom discussions. (*Id.* at p. 970; *Kaye v. Board of Trustees of the San Diego Public Law Library* (2009) 179 Cal.App.4th 48, 58–59 [applying federal free speech precedents governing government employee speech to claim under California's free speech clause].) To the extent the U.S. Supreme Court has suggested an exception for certain public school teachers in *Garcetti v. Ceballos* (2006) 547 U.S. 410, 425), that exception would only apply "to teachers at 'public colleges and universities,' [citation], not primary and secondary school teachers." (*Johnson*, at p. 966, fn. 12.) Accordingly, the trial court did not abuse its discretion in sustaining the demurrers to Berry's free speech claims without leave to amend.

B. Berry's Request for Leave to Amend

Berry contends the trial court abused its discretion by refusing to give him the opportunity to file a noticed motion to amend his complaint to add new causes of action before dismissing the case. We agree.

"[G]enerally courts will liberally allow amendments at any stage of the proceeding." (*Falcon v. Long Beach Genetics, Inc.* (2014) 224 Cal.App.4th 1263, 1280 (*Falcon*); Code Civ. Proc., § 473, subd. (a)(1).) "If the motion to amend is timely made and the granting of the motion will not prejudice the opposing party, it is error to refuse permission to amend and where the refusal also results in a party being deprived of the right to assert a meritorious cause of action or a meritorious defense, it is not only error but an abuse of discretion." (*Morgan v. Superior Court* (1959) 172 Cal.App.2d 527, 530.) Even if there has been a delay in seeking leave to amend, it is an abuse of discretion to deny leave if the opposing party has not been prejudiced or misled. (*Higgins v. Del Faro* (1981) 123 Cal.App.3d 558, 564–565.) Indeed, "[m]otions to amend are appropriately granted as late as the first day of trial . . . or even during trial . . . if the defendant is alerted to the charges by the factual allegations, no matter how framed . . . and the defendant will not be prejudiced." (*Honig v. Financial Corp. of America* (1992) 6 Cal.App.4th 960, 965.)

Here, Berry made an oral motion for leave to amend his complaint to add new causes of action at the hearing on respondents' applications to dismiss the case. (See *Falcon*, *supra*, 224 Cal.App.4th at pp. 1280–1282 [addressing "oral motion for leave to amend" on the merits].) In refusing to grant leave and dismissing the case, the trial court appeared to rely on Berry's failure to file a noticed motion. But Berry's delay in doing so is reasonable in light of the trial court's order advising him to file a motion to

add new causes of action "after the current pleadings are settled." More importantly, there is no evidence of prejudice due to Berry's delay in filing such a motion. Berry informed the trial court and respondents of his intention to add new causes of action almost four months before the hearing. He then made his oral request to add new causes of action only two weeks after his SAC had been settled. Nor can we conclude, based on the record before us, that the proposed amendments would have been futile. Accordingly, it was an abuse of discretion to deny Berry the opportunity to file a motion for leave to amend.[6]

DISPOSITION

We reverse the judgment as to Berry's gender discrimination cause of action. We also reverse the judgment to give Berry the opportunity to amend his complaint to add new causes of action. We affirm in all other respects. Berry shall recover his costs on appeal.

[6] In so holding, we do not consider the validity of any new causes of action that Berry may assert. Thus, respondents may still oppose any motion for leave to amend filed by Berry or demur to any amended pleadings.

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Chou, J.*

WE CONCUR:

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Fujisaki, Acting P. J.

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Petrou, J.

A160256

* Judge of the Superior Court of San Mateo County, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.